

Judge Clark awarded claimant permanent disability benefits under K.S.A. 44-510e for a 12 percent whole person functional impairment. That functional impairment rating was provided by Dr. Philip R. Mills, whom the Judge selected to perform an independent

medical evaluation. The Judge also determined the appropriate date of accident for claimant's bilateral upper extremity injuries was March 4, 2003, when she left work for right carpal tunnel release surgery. Finally, the Judge found claimant's average weekly wage was \$416.06 for purposes of this claim.

The principal issue raised on this appeal is the nature and extent of claimant's injury and disability. Respondent argues claimant did not injure her left upper extremity at work and, therefore, she should only receive disability benefits for her right upper extremity under the schedules in K.S.A. 44-510d. In the alternative, respondent argues claimant suffered two separate, non-simultaneous injuries to her upper extremities and, consequently, she should be awarded the scheduled benefits under K.S.A. 44-510d for a two percent permanent disability to the right upper extremity and an eight to 10 percent permanent disability to the left upper extremity.

Conversely, claimant contends the Award should be affirmed.

The parties have raised the following issues for review:

1. Are the preliminary hearing transcript and the medical records attached to that transcript part of the record for purposes of this award?
2. Is claimant entitled to receive a separate award of temporary total disability benefits for the period of time she missed work immediately following June 21, 2002, when a computer monitor slipped out of her hands?
3. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

1. Claimant began working for respondent in the fall of 2000. Claimant's job was making cruise reservations, which required her to enter data with a computer keyboard eight hours a day, 40 hours a week.
2. On approximately June 21, 2002, claimant injured her right hand and arm when she dropped a computer monitor. Claimant experienced pain in her right arm that she attributed to a pulled muscle. The parties stipulated claimant's accident arose out of and in the course of her employment with respondent.

3. In early July 2002, claimant began treating with Dr. George L. Lucas. Dr. Lucas treated claimant's right arm until August 15, 2002, when he released her to return to her regular job duties. On August 15, 2002, Dr. Lucas noted claimant had a positive Tinel's sign over the median nerve in both wrists. Moreover, the doctor's July 2002 office notes support claimant's testimony that she experienced numbness in both hands for a period of time before the computer monitor incident. Despite the medical history Dr. Lucas initially recorded, the computer monitor did not strike claimant's right hand.
4. Following the computer monitor incident, claimant was off work for medical treatment from approximately June 24, 2002, until sometime in August 2002, after Dr. Lucas released her to return to regular work.
5. According to Dr. Lucas, claimant recovered from the June 2002 computer monitor incident. Claimant, however, returned to Dr. Lucas in early November 2002 with additional complaints that the constant use of her computer was increasing her symptoms. Claimant advised the doctor her right arm was falling asleep more and that she was having problems gripping. Claimant also advised the doctor she had numbness in her left hand. Dr. Lucas requested electromyographic (EMG) studies, the results of which indicated claimant had bilateral carpal tunnel syndrome.
6. Claimant was off work from early November 2002 through mid-January 2003 for medical reasons unrelated to her upper extremity problems. On January 16, 2003, claimant returned to work for respondent. From January 16, 2003, through February 27, 2003, claimant limited her time on the computer to no more than four hours per day. Claimant's symptoms persisted and when she returned to Dr. Lucas in early February 2003, the doctor recommended surgery. On March 4, 2003, Dr. Lucas performed right carpal tunnel release surgery. And three months later, in June 2003, the doctor performed left carpal tunnel release surgery.
7. After recovering from the second surgery, claimant returned to work for respondent in late August 2003. When the record was closed, claimant continued to work for respondent and, accordingly, she limits her request for permanent partial general disability benefits under K.S.A. 44-510e to her functional impairment rating.
8. Claimant initiated these claims by filing an Application for Hearing with the Division of Workers Compensation. The application, which was filed on April 7, 2003, alleges a specific accident on June 21, 2002, and another accident on March 4, 2003, and each day afterwards.
9. At the regular hearing, respondent announced it had paid a total of \$3,173.21 at \$250.89 per week in temporary total disability benefits for the June 21, 2002,

incident and temporary total disability benefits in the sum of \$3,051.18 at \$277.39 per week for the claimed repetitive trauma injury that claimant alleged occurred on March 4, 2003, and each day afterwards. Claimant agreed there were no additional temporary total disability benefits claimed.

10. The Board finds claimant sustained personal injury by accident on June 21, 2002, that injured her right hand and arm. The evidence fails to establish that claimant sustained permanent injury from that accident.
11. The Board affirms the Judge's finding that claimant developed bilateral carpal tunnel syndrome from performing her work as a reservations clerk for respondent. The Board further affirms the Judge's finding that claimant sustained a 12 percent whole person functional impairment as measured by the *AMA Guides*¹ (4th ed.) due to the bilateral carpal tunnel syndrome. Like the Judge, the Board finds Dr. Philip R. Mills' opinions regarding permanent impairment more persuasive than those of Dr. Lucas as Dr. Mills saw claimant pursuant to a court order for an independent medical evaluation and as Dr. Lucas admitted he did not bother to open the *AMA Guides* (4th ed.) to confirm his ratings.

CONCLUSIONS OF LAW

Preliminary Hearing Transcript

On May 1, 2003, the parties appeared before Judge Clark for a preliminary hearing. Numerous medical records were introduced at that hearing. In the March 3, 2005, Award, the Judge did not list the preliminary hearing transcript as part of the record to be considered. Moreover, when the parties appeared at the October 20, 2004, regular hearing, the Judge and parties did not discuss whether the preliminary hearing transcript and the attached medical records were to be considered as part of the record for purposes of final award.

At oral argument before this Board, claimant requested both the preliminary hearing transcript and the medical records be considered for purposes of this award. Conversely, respondent requested neither the transcript nor the exhibits be considered.

The preliminary hearing statute, K.S.A. 44-534a, is silent regarding whether a preliminary hearing transcript should be considered as part of the evidentiary record in the final award. But K.A.R. 51-3-5a provides that medical reports and medical records introduced at a preliminary hearing shall not be considered as evidence for purposes of

¹ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

final award unless they are supported by the testimony of the people who made them or the parties otherwise stipulate.

(a) Medical reports or any other records or statements shall be considered by the administrative law judge at the preliminary hearing. However, the reports shall not be considered as evidence when the administrative law judge makes a final award in the case, unless all parties stipulate to the reports, records, or statements or unless the report, record, or statement is later supported by the testimony of the physician, surgeon, or other person making the report, record, or statement. If medical reports are not available or have not been produced before the preliminary hearing, either party shall be entitled to an ex parte order for production of the reports upon motion to the administrative law judge.²

In this instance, the parties did not stipulate that the medical records attached to the preliminary hearing transcript could be considered for purposes of final award. But by implication the regulation assumes the transcript of testimony is part of the record. Accordingly, the Board concludes the preliminary hearing transcript is part of the record but the attached medical records, other than those of Dr. Lucas who subsequently testified, are not part of the record for purposes of the final award.

Nature and Extent of Injury and Disability

As indicated above, the evidence fails to establish that claimant sustained permanent injury from the June 21, 2002, accident. Consequently, claimant is entitled to an award for the temporary total disability benefits that respondent paid for that accident. But claimant is not entitled to receive any permanent partial disability benefits for that accident under either K.S.A. 44-510d or K.S.A. 44-510e.

Claimant sustained simultaneous injury to both upper extremities. Accordingly, claimant is entitled to receive permanent partial general disability benefits as defined by K.S.A. 44-510e. Claimant has returned to work for respondent at a wage within 90 percent of her pre-injury wage and, therefore, her request for permanent partial disability benefits is limited to her 12 percent whole person functional impairment rating for the repetitive trauma injury that resulted in the bilateral carpal tunnel syndrome. Because the combination of those bilateral injuries is not addressed by the schedule set forth in

² K.A.R. 51-3-5a.

K.S.A. 44-510d, claimant's permanent disability benefits for these injuries are governed by K.S.A. 44-510e.³

The Judge determined March 4, 2003, should be utilized as the date of accident for purposes of computing claimant's workers compensation benefits for the bilateral upper extremity repetitive trauma injuries. The parties have not challenged that date and the Board finds no reason to disturb that finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the March 3, 2005, Award entered by Judge Clark should be modified to award claimant temporary total disability benefits and medical benefits for her June 21, 2002, accident. In addition, claimant should receive a second award for medical benefits, temporary total disability benefits, and permanent partial general disability benefits under K.S.A. 44-510e for a 12 percent whole person functional impairment for her March 4, 2003, accident.

June 21, 2002, Accident

Cheryl A. Sicard is granted compensation from Royal Caribbean Cruises, Ltd., and its insurance carrier for a June 21, 2002, accident. Ms. Sicard is entitled to receive 12.65 weeks of temporary total disability benefits at \$250.89 per week, or \$3,173.21, for a total award of \$3,173.21, which is all due and owing less any amounts previously paid.

March 4, 2003, Accident

Cheryl A. Sicard is granted compensation from Royal Caribbean Cruises, Ltd., and its insurance carrier for a March 4, 2003, accident and resulting disability. Based upon an average weekly wage of \$416.06, Ms. Sicard is entitled to receive 11 weeks of temporary total disability benefits at \$277.39 per week, or \$3,051.18, plus 49.80 weeks of permanent partial general disability benefits at \$277.39 per week, or \$13,814.02, for a 12 percent permanent partial general disability, making a total award of \$16,865.20, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

³ *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001); *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997); *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

IT IS SO ORDERED.

Dated this ____ day of October, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas M. Warner, Jr., Attorney for Claimant
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director